12-4160

To Be Argued By:
RICHARD J. SCHECHTER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-4160

UNITED STATES OF AMERICA,

Appellee,

-vs-

GREGORY VIOLA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA IN RESPONSE TO *PRO SE* BRIEF

DEIRDRE M. DALY
United States Attorney
District of Connecticut

RICHARD J. SCHECHTER
SANDRA S. GLOVER *(of counsel)*
Assistant United States Attorneys

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PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

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Preliminary Statement

After briefing was complete in this case, Appellant Gregory Viola filed an 81-page Supplemental *Pro Se* Brief raising a myriad of issues that were not raised by his retained appellate counsel and that were not raised by his court-appointed counsel at any time in the district court. These belated complaints can be summarized into two groups as follows: (1) that the district court imposed an unreasonable sentence

because it erred in its calculation of the fraud loss, in the calculation of the number of victims, and in application of the enhancement for "investment adviser;" and (2) that the district court had no jurisdiction to issue an amendment to the original judgment to clarify the recipients of the district court's restitution order.

In short, Viola argues that his guidelines were erroneously calculated and that his sentence should be vacated. Because Viola failed to object to his guideline calculation at sentencing, and in fact agreed that the district court properly calculated the guidelines, Viola has waived and forfeited his right to challenge the guideline calculation at sentencing. Thus, he is not entitled to a reversal or vacatur of his sentence. In any event, there was no error, let alone plain error, in calculating the guidelines where there was a factual basis for each of the enhancements. Viola cannot satisfy the plain error standard because he agreed that the applicable guideline range was 97 to 121 months and Probation and the district court found that this range was correct. The district court did not plainly err in imposing a 100-month sentence for Viola's four-year Ponzi scheme in which more than 50 victims lost more than $6 million.

Finally, the district court acted properly in clarifying the recipients of the restitution order in the original judgment. The clarifying amendment to the judgment not only made explicit

what was implicit in the original judgment, but also acted to aid the appellate process by making the original order of restitution clear. In any event, even assuming *arguendo* that the district court had no jurisdiction to clarify the restitution order, Viola is not entitled to any relief because he cannot show any prejudice.

I. The district court did not plainly err in calculating the guidelines.

A. Relevant facts

1. The PSR's calculation of the guidelines and the defendant's sentencing memorandum

As described in detail in the Government's Brief, *see* pp. 11-12, the Pre-Sentence Report ("PSR") determined that the defendant's base offense level was 7 under U.S.S.G. § 2B1.1(a)(1). PSR ¶ 35. It then added 18 levels under § 2B1.1(b)(1)(J) because the loss from the defendant's fraudulent conduct exceeded $2,500,000, but was not more than $7,000,000. PSR ¶ 36. Four more levels were added under § 2B1.1(b)(2)(B), as the offense involved 50 or more victims. PSR ¶ 37. An additional four levels followed under § 2B1.1(b)(18)(A)(iii), because the defendant was a paid "investment adviser" and violated securities law at the time of the of-

fense.[1] PSR ¶ 38. Three levels were subtracted for acceptance of responsibility. PSR ¶ 43. With a resulting total offense level of 30 and no criminal history, the PSR determined that defendant's guideline range was 97 to 121 months in prison. PSR ¶¶ 44-46, 84.

Prior to sentencing, the defendant submitted a sentencing memorandum to the district court in which he agreed that the PSR's calculation of the guidelines was entirely correct. *See* Government Appendix ("GA") 9-49. Significantly, the memorandum conceded as follows:

> Mr. Viola and the government are in agreement with the guidelines ranges for loss and for the number of victims:
>
> * * *
>
> Mr. Viola submits that the overall loss figure for the "net losers" of the scheme is more than $2.5 million, but less than $7 million. . . . The guidelines provide that this results in an increase in 18 to the offense level. The government and Mr. Viola are in agreement with this guidelines range.

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[1] Under the 2011 guidelines used for the defendant's sentencing, the investment advisor enhancement was found at U.S.S.G. § 2B1.1(b)(18)(A)(iii). In the 2013 guidelines, that enhancement was moved to § 2B1.1(b)(19)(A)(iii).

> Mr. Viola submits that the number of victims is 50 or more. The guidelines provide that this results in an increase in 4 to the offense level. The government and Mr. Viola are in agreement with this guidelines range.
>
> The guidelines provide for an adjustment of 4 levels pursuant to section 2B1.1(b)(18)(A)(iii).
>
> * * *
>
> Thus, Mr. Viola has a total offense level of 30 . . . .

GA20-21 (footnotes omitted).

Moreover, Viola submitted an exhibit to his sentencing memorandum, Exhibit 10, in which he listed the individuals he perceived to be the victims of his criminal conduct and their respective loss amounts. GA66. This list, prepared by the defendant himself and not his counsel, detailed more than 50 victims with a total loss in excess of $6 million. While the defendant agreed with the conclusion that there were more than 50 victims and losses in excess of $2.5 million, the defendant offered slightly different numbers than the Government's numbers. For example, while the Government argued that the total loss amount was $6,872,633.97, the defendant's list suggested that the loss amount was $6,531,239. GA66. To make the number of victims and their respective loss amounts clear, the Government

submitted a chart to the district court that detailed the names of the 55 victims and their respective loss amounts.[2]

2. Viola's failure to object at sentencing to the PSR's calculation of the guidelines

At the October 4, 2012 sentencing hearing, the district court explicitly asked Viola and his counsel whether they had read the PSR. Viola Appendix ("VA") 109. Without equivocation, Viola indicated that he had read the PSR, had no objection to the PSR's facts, and specifically agreed that there were more than 50 victims. VA109-11. The district court also evaluated each of the applicable enhancements and concluded

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[2] The chart was submitted to the district court under seal as Attachment A to the Government's sentencing memorandum. Apparently the Government's motion to seal the Attachments to the sentencing memorandum and the Attachments were not docketed on the record although the materials were part of the record and considered by the district court at sentencing. To assist this Court in its consideration of this appeal, the Government is filing with this brief (1) a motion to supplement the record on appeal with the Attachments, (2) a motion to seal the Attachments, and (3) the Attachments themselves. *See* Rule 10(e), Federal Rules of Appellate Procedure (permitting the record to be supplemented to correct a mistake in the record).

that the applicable guideline range was 97-121 months at offense level 30. VA179-80. Accordingly, the district court adopted the facts and the recommended guidelines contained in the PSR. VA111, VA179-80.

During the sentencing hearing, the district court noted that there was "no disagreement among the parties" as to the calculation of the guidelines. VA179. Neither Viola nor his counsel below took issue with this statement. Indeed, at no time during the sentencing hearing did Viola suggest in any manner that any of the guideline calculations were incorrect. In fact, Viola and his counsel sought to appear contrite rather than to quibble with any of the guideline enhancements that were fully supported by the facts. As defendant's counsel succinctly explained, Viola's "sole purpose" was "to respectfully seek the compassion and discretion of the [district] Court that the law provides." VA129.

When Viola himself addressed the district court, he made no mention of the amount of the loss, the number of victims, or the proposed enhancement for being an "investment adviser." Rather, he sought to explain to the sentencing court that he was "truly very sorry for all the

harm that I have caused the victims in my case." VA151.[3]

B. Governing law and standard of review

To the extent that the defendant did not raise a perceived sentencing error below, this Court applies a plain error standard of review. *United States v. Villafuerte*, 502 F.3d 204, 207 (2d Cir. 2007). Requiring that such claims be raised before the sentencing judge "alerts the district court to a potential problem at the trial level and facilitates its remediation at little cost to the parties, avoiding the unnecessary expenditure of judicial time and energy in appeal and remand." *Id.* at 208. Moreover, "[r]equiring the [sentencing] error to be preserved by an objection creates incentives for the parties to help the district court meet its obligations to the public and the parties." *Id.* at 211.

Pursuant to Fed. R. Crim. P. 52(b), plain error review permits this Court to grant relief only

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[3] Viola's current suggestion that he could not hear the questions asked of him by the district court is belied by the record. When the district judge told Viola "if you don't hear me, please speak up," Viola acknowledged her by saying "Yes, Your Honor." VA109. Further, the sentencing transcript reflects that Viola responded appropriately and without hesitation when addressed during the hearing.

where (1) there is error, (2) the error is plain, (3) the error affects substantial rights, and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Williams*, 399 F.3d 450, 454 (2d Cir. 2005) (citing *United States v. Cotton*, 535 U.S. 625, 631-32 (2002), and *United States v. Olano*, 507 U.S. 725, 731-32 (1993)).

To "affect substantial rights," an error must have been prejudicial and affected the outcome of the district court proceedings. *Olano*, 507 U.S. at 734. This language used in plain error review is the same as that used for harmless error review of preserved claims, with one important distinction: In plain error review, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.*

This Court has cautioned that reversal under the plain error standard of review should "be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *Villafuerte*, 502 F.3d at 209 (internal quotation marks omitted).

A defendant may do more than merely forfeit a claim of error. A defendant may through his words, his conduct, or by operation of law waive a claim, so that this Court will altogether decline to adjudicate that claim of error on appeal. *See Olano*, 507 U.S. at 733; *United States v. Broxmeyer*, 699 F.3d 265, 278-79 (2d Cir. 2012),

cert. denied, 133 S. Ct. 2786 (2013); *United States v. Polouizzi*, 564 F.3d 142, 153 (2d Cir. 2009); *United States v. Hertular*, 562 F.3d 433, 444 (2d Cir. 2009); *United States v. Quinones*, 511 F.3d 289, 320-21 (2d Cir. 2007); *United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir. 1995). "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *Olano*, 507 U.S. at 733 (internal quotation marks omitted). "The law is well established that if, as a tactical matter, a party raises no objection to a purported error, such inaction constitutes a true waiver which will negate even plain error review." *Quinones*, 511 F.3d at 321 (internal quotations omitted; footnote omitted).

C. Discussion

Not only did Viola fail to object to the loss calculation, the number of victims, and the "investment adviser" enhancement at sentencing, but he also specifically agreed with the district court's guideline calculations which included the aforementioned enhancements. Rather than contesting the guidelines, Viola chose to seek the compassion of the court. VA129. Thus, having made a tactical decision to adopt the guidelines as calculated in the PSR, Viola has knowingly waived any challenge to the calculation of the guidelines. Accordingly, this Court should de-

cline to adjudicate his claims of error on appeal. *See Olano*, 507 U.S. at 733; *Polouizzi*, 564 F.3d at 153; *Hertular*, 562 F.3d at 444; *Quinones*, 511 F.3d at 320-21; *Yu-Leung*, 51 F.3d at 1122. In sum, by making the tactical decision not to challenge the calculation of the guidelines at his sentencing, Viola has waived and forfeited his right to challenge this calculation on appeal.

In any event, even if this Court were to find that Viola had merely forfeited his current claims, he cannot satisfy the plain error standard of review because there is no error, let alone plain error in the calculation of the guidelines.

In connection with sentencing, the district court reviewed a comprehensive PSR and lengthy sentencing memoranda submitted by both parties. GA6-168. Thereafter, the district court properly calculated the guidelines for Viola's criminal conduct. VA179-80. The victim loss chart submitted by the Government and the victim loss chart submitted by Viola identified victims who lost more than $ 6 million as a result of Viola's fraudulent conduct.[4] Both charts identi-

[4] Given that Attachment A to the Government's sentencing memorandum was discussed repeatedly at the sentencing hearing, *see* VA173-75, and the fact that Viola submitted his own version of a loss chart that was comparable to the Government's Attachment A, GA66, Viola's claim that he never saw Attachment A is belied by the record.

fied more than 50 victims. Thus, in the absence of any dispute, and in the face of two lists that identified *by victim name* more than $6 million in losses, the district court was not required to conduct an elaborate loss hearing. Under these circumstances, the district court properly concluded that Viola's base offense level should be enhanced for a loss amount in excess of $2.5 million (18 levels) and for more than 50 victims (4 levels).

Furthermore, the four-level enhancement for being an "investment adviser" was supported by applicable case law cited in the Government's sentencing memorandum, GA139, and by the facts of this case. *See United States v. Ogale*, 378 Fed. Appx. 959, 960-61 (11th Cir. 2010) (per curiam) (discussing the applicability of the four-level enhancement in a similar case). There is no requirement under the guidelines that the defendant be a *registered* investment adviser. Rather, the enhancement pursuant to U.S.S.G. § 2B1.1(b)(18) is applicable when the offense involved a violation of the securities law and, at the time of the offense, the offender was an "investment adviser" as that term is defined in 15 U.S.C. § 80b-2(a)(11).

Here, Viola committed a violation of the securities law when he falsely advised investors that he was investing their funds, and then mailed them false portfolio statements which falsely represented the amount and nature of the in-

vestments under his management. He was also an "investment adviser" as that term is defined in 15 U.S.C. § 80b-2(a)(11) in that he charged a fee to investors in exchange for investment advice, and advised investors as to the advisability of investing in securities under his management. Thus, the district court properly increased Viola's offense level by four levels under § 2B1.1(b)(18)(A)(iii).

In short, on the record before it, the district court committed no error, much less plain error, when it calculated the guidelines. Moreover, given Viola's position on the guidelines before the district court, the purported errors that Viola now raises could never amount to the rare instance in which a "miscarriage of justice would otherwise result." *Villafuerte*, 502 F.3d at 209 (internal quotation marks omitted). Accordingly, the district court's judgment should be affirmed.

II. The district court did not plainly err in amending the judgment to add the names of the victims owed restitution.

A. Relevant facts

In its sentencing memorandum, the Government requested that the court impose restitution in the full amount of the victims' losses. GA149-52. The Government submitted a loss chart prepared by an FBI analyst identifying 55 victims and their respective losses in the total amount of $6,872,633.97. During the sentencing hearing,

the Government asked the district court to impose restitution for the 55 victims in the precise amounts set forth in the chart. VA173-75. Viola raised no objection to the Government's request for this precise amount of restitution or to the 55 recipients entitled to receive restitution.

During its pronouncement of sentence, the district court discussed the methodology used to determine the requested amount of restitution. VA180-81. The district court then imposed restitution in the amount of $6,872,633.97. VA182. Prior to the conclusion of the sentencing hearing, the Government requested that the district court clarify that restitution was to be paid to the victims on a *pro rata* basis. VA193-94. The district court clarified that the restitution would be paid to the victims in proportion to their losses. VA194.

On October 5, 2012, the district court issued the judgment. VA196-99. The judgment ordered Viola to pay restitution immediately in the amount of $6,872,633.97. The judgment did not, however, identify the victims by name or their respective loss amounts. VA197. Viola filed his Notice of Appeal on October 15, 2012. VA202. On November 9, 2012, the district court issued an order amending the restitution judgment "to require payment to the victims listed in Attachment A annexed to the Government's Sentencing Memorandum." VA200. Neither Viola, nor his

counsel, objected to the district court's order clarifying the recipients of the restitution order.

B. Governing law and standard of review

To the extent that the defendant did not raise a perceived sentencing error below, this Court applies a plain error standard of review. *Villafuerte*, 502 F.3d at 207; *accord United States v. Zangari*, 677 F.3d 86, 91 (2d Cir. 2012) (holding that Court of Appeals reviews for plain error when a defendant fails to object to a restitution order at the time of sentencing). "While an effective notice of appeal, *see* Fed. R. App. P. 4(b), does divest the district court of its control over those aspects of the case involved in the appeal, a district court still may act in 'aid of the appeal.'" *United States v. Nichols*, 56 F.3d 403, 410-11 (2d Cir. 1995) (quoting *United States v. Ransom*, 866 F.2d 574, 575-76 (2d Cir. 1989) (per curiam)).

C. Discussion

During its oral pronouncement of sentence, the district court imposed restitution in the amount of $6,872,633.97. VA182. This was the precise amount set forth in the Government's chart of victim losses prepared by an FBI analyst and the precise amount requested by the Government at sentencing. Accordingly, when the district court imposed restitution in this

amount, it reflectd an intent to impose restitution in favor of the 55 victims listed in the Government's chart. The district court's original judgment did not, however, make this fact explicitly clear. VA197.

Shortly after sentencing, but after the Notice of Appeal was filed, the district court more precisely identified the recipients of the restitution order by issuing an order to clarify the judgment. VA200. At no time did the district court modify or alter the restitution amount of $6,872,633.97. Furthermore, neither Viola, nor his counsel below, nor his counsel on appeal, ever objected to the district court's clarification order.

In his *pro se* brief, Viola now complains that the district court was not entitled to clarify the restitution order by amending the judgment after Viola filed his Notice of Appeal. Contrary to Viola's belated complaint, however, the district court acted properly in clarifying the recipients of the restitution order in the original judgment. The amendment to the judgment not only made explicit what was implicit in the original judgment, the amendment acted to aid the appellate process by making the original order of restitution clear. This Court has held that a district court may clarify the record even after the filing of a Notice of Appeal if the clarification can serve to aid the appellate process and avoid a possible remand. *See, e.g., Nichols,* 56 F.3d at 410-11

(supplemental finding by district court after Notice of Appeal was filed was a permissible act in aid of appeal).

Even assuming *arguendo* that Viola is correct that the district court erred in clarifying the restitution order after he filed his Notice of Appeal, he is not entitled to a ruling that would vacate his sentence. In fact, the original judgment required Viola to pay restitution in the amount of $6,872,633.97. Nothing in the district court's clarifying order changed this amount and thus, Viola has not been prejudiced by the clarification order. Thus, even assuming Viola is correct that the district court erred when it sought to clarify the restitution judgment, Viola is not entitled to relief under the plain error standard of review.[5]

Indeed, Viola cannot demonstrate each of the prongs of the plain error standard as the purported error in clarifying the judgment is harmless. Quite simply, the decision by the district court to clarify the recipients of the restitution order does not affect substantial rights or seriously affect the fairness, integrity, or public reputation of judicial proceedings. *See Zangari*, 677

[5] Even if Viola could show that the court's clarifying order went beyond its authority to act in aid of the appeal, at most, Viola would be entitled to an order vacating the clarifying order and directing the district court to re-enter the order after the mandate issues from this Court.

F.3d at 95-96 (this Court refused to disturb district court's restitution order on plain error review where defendant failed to demonstrate that erroneous restitution order prejudiced him or resulted in a miscarriage of justice). Because the purported error that Viola now raises does not amount to the rare instance in which a "miscarriage of justice would otherwise result," *Villafuerte*, 502 F.3d at 209 (internal quotation marks omitted), he is not entitled to either a remand or a resentencing.

In sum, Viola should be required to pay $6,872,633.97 in restitution. Hence, the district court's judgment and its clarifying order should not be disturbed.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: January 17, 2014

Respectfully submitted,

DEIRDRE M. DALY
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

RICHARD J. SCHECHTER
ASSISTANT U.S. ATTORNEY

Sandra S. Glover
Assistant United States Attorney (of counsel)